STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
(Before Owens, P.J., and Schuette and Borrello, J.J.)

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD, State Representative in her official capacity,

Plaintiffs/Appellees,

v.

THE STATE OF MICHIGAN,

Defendant/Appellant,

and

GAMING ENTERTAINMENT, LLC, and LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Intervening Defendants/Appellees,

and

NORTH AMERICAN SPORTS MANAGEMENT CO.,

Intervening Defendant.

Supreme Court No. 129822

Court of Appeals No. 225017

Ingham County Circuit Court
No. 99-90195-CZ

BRIEF OF STATE OF MICHIGAN AS APPELLEE

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

ORAL ARGUMENT REQUESTED

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BASIS OF JURISDICTION

This Court granted the application of Plaintiffs Taxpayers of Michigan Against Casinos and State Representative Laura Baird (jointly, "TOMAC") pursuant to MCR 7.301(A)(2) and, therefore, acquired jurisdiction under that rule.

On its surface, TOMAC's appeal asks this Court to consider whether its decision in *Taxpayers of Michigan Against Casinos v State*, 471 Mich 306; 685 NW2d 221 (2004) ("*TOMAC I*") overruled the Court of Appeals decision in *Tiger Stadium Fan Club v Governor*, 217 Mich App 439; 553 NW2d 7 (1996), holding that a 1993 consent decree pursuant to which Indian Tribes paid a percentage of their gaming revenues to the Michigan Strategic Fund ("MSF") violated the Appropriations Clause of the Michigan Constitution. The actual question presented, however, is not whether the analysis utilized in *Tiger Stadium* would have produced a different result in light of *TOMAC I*. That analysis does not control this Court. Rather, the question is: What is the constitutional analysis that does apply to the revenue sharing provision involved in the Tribal-State gaming compacts that are now before this Court and what result is dictated by that analysis?

The State's answer to this question is provided in this brief. The constitutional analysis must start with the language of the Appropriations Clause. It provides that no money shall be paid out of the "state treasury" except as appropriated by law. Const 1963, art 9, §17. The money received by the MSF pursuant to Section 17 of the Compact is paid out of tribal gaming revenues, not the Treasury. Thus, no appropriation is required for payments out of those funds to be made to the MSF.

Furthermore, the payments received by the MSF are not themselves "receipts of state government" that are within the control of the Treasury Department pursuant to MCL 18.1441(1), as argued by TOMAC. The MSF is distinct from the State. It is a "public body corporate and politic". MCL 125.2005(1). Although the MSF is "within" the Treasury Department, it is an "autonomous entity" that exercises its powers "independently of the state treasurer." *Id.* Thus, receipts of the MSF are simply not "receipts of state government."

The second issue presented by this appeal is whether the MSF is statutorily authorized to receive the tribal payments. It does have such authority. The statute creating and governing the MSF gives it broad power to accept "gifts," "grants," or "aids." MCL 125.2007(b). Here, the Tribal payments are such gifts, grants, or aids to the MSF.

Finally, TOMAC's appeal asks whether the provision in the Compacts requiring payment to the MSF is severable from the rest of the contract. Contrary to TOMAC's interpretation, Section 12(E) of the Compact, while providing that most provisions of the Compacts are severable, is simply silent on whether the parties intended the Compacts to survive if any provision in Section 17 is invalidated. The Court must look then to the substantive provisions of the Compact to determine whether the parties intended the MSF provision to be central to their agreement. The principal objective of Section 17 is to ensure that the Tribe makes payments that are sufficient to give the State an incentive to contain the expansion of casino gaming in Michigan, an incentive that works to the competitive advantage of the Tribe. Paying the money to the MSF is one, but not the only, way to create that incentive. Indeed, if this Court were to strike the provision of the Compacts requiring payment to the MSF it would be because the payments must be

"receipts of state government" subject to the control of the Treasury and which the Legislature could appropriate for the MSF or for some other use. Clearly, paying the money to the Treasury would still give the requisite incentive to the State. Furthermore, the Compacts contemplate that the Tribe will pay the MSF or its "successor as determined by State law," reflecting the parties' understanding that it was not critical that the MSF be the recipient of the payments. (Compacts, § 17(C).) If this Court were to find that the law requires the tribal payments to be "receipts of state government," the State Treasury would become the MSF's "successor" as the recipient of the tribal payments.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Did the Legislature act consistently with the Appropriations Clause of the Michigan Constitution, which provides that no money shall be paid out of the State Treasury except as appropriated by law, when it adopted a concurrent resolution approving a gaming compact between the State and an Indian Tribe providing that the Michigan Strategic Fund shall receive a payment out of tribal gaming revenues and where the funds held by the MSF are not subject to the control of the State Treasury?

The Circuit Court did not answer this question.
The Court of Appeals did not answer this question.
TOMAC answers: "No."
The Intervenors answer: "Yes."
The State answers: "Yes."

II. Is the Michigan Strategic Fund authorized to accept payments from certain Indian Tribes pursuant to gaming compacts with the State where a statute allows the Michigan Strategic Fund to receive gifts, grants or other aids and the Michigan Strategic Fund gave nothing in exchange for the payments?

The Circuit Court did not answer this question.
The Court of Appeals did not answer this question.
TOMAC answers: "No."
The Intervenors answer: "Yes."
The State answers: "Yes."

III. Is a provision in a gaming compact between the State and an Indian Tribe that provides that the Tribe shall make payments to the Michigan Strategic Fund severable from the rest of the compact where payment to the MSF is not essential to give effect to the parties' intent of providing an economic incentive for the State to contain the expansion of casino gaming?

The Circuit Court did not answer this question.
The Court of Appeals did not answer this question.
TOMAC answers: "No."
The Intervenors answer: "Yes."
The State answers: "Yes."

COUNTER-STATEMENT OF FACTS

I. FACTS

Under the federal Indian Gaming Regulatory Act ("IGRA"), 25 USC §2701, *et seq*, an Indian tribe may conduct gaming within the borders of a state if the activity conforms to a compact between the state and the tribe. In the early 1990s, then-Governor Engler negotiated and signed seven such compacts with various tribes in connection with a consent decree resolving a federal lawsuit filed by the tribes against the Governor. The consent decree provided, among other things, that a certain percentage of the tribes' net win would be paid to the Michigan Strategic Fund ("MSF"). The Legislature approved the associated compacts by concurrent resolution in September 1993.[1]

The tribal payment provision of the consent decree was subsequently challenged as violating the Appropriations Clause of the Michigan Constitution. The Ingham County Circuit Court rejected that challenge. In 1996, its ruling was affirmed in *Tiger Stadium Fan Club v Governor*, 217 Mich App 439; 553 NW2d 7 (1996), *lv den* 453 Mich 866; 552 NW2d 18 (1996).

In 1997 and 1998, Governor Engler negotiated four more compacts (the "Compacts") with tribes located in Michigan: the Little River Band of Ottawa Indians, the Pokagon Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians and the Nottawaseppi Huron Potawatomi (collectively, the "Tribes").[2] Similar to the consent decree

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[1]None of these compacts is involved in this litigation.

[2]The substantive terms of these Compacts, which are the ones involved in this case, are virtually identical. A representative Compact is attached in TOMAC's Appendix ("TOMAC App") at 3a-26a.

that led to the original seven compacts, these agreements contain a provision requiring the Tribes to make semi-annual payments to the "Michigan Strategic Fund, or its successor as determined by state law" of 8% of the net win at each casino derived from all Class III electronic games of chance ("Revenue Sharing Provision"). (Compact, §17; TOMAC App at 21a.) The relevant portions of Section 17 are set forth below:

> (A) The State and the Tribe have determined that it is in the interests of the people of the State and the members of the Tribe to maximize the economic benefits of Class III gaming for the Tribe and to minimize the adverse effects of Class III gaming by providing a mechanism to reduce the proliferation of Class III gaming enterprises in the State in exchange for the Tribe providing important revenue to the State.
>
> (B) So long as there is a binding Class III Compact in effect between the State and Tribe and no change in State law is enacted which is intended to permit or permits the operation of electronic games of chance or commercial casino games by any other person (except a person operating such games in the City of Detroit pursuant to the Initiated Law of 1996, MCL 432.201 et seq.) and no other person (except a federally-recognized Indian Tribe operating pursuant to a valid Compact under IGRA or a person operating in the City of Detroit pursuant to the Initiated Law of 1996, MCL 432.201) within the State lawfully operates electronic games of chance or commercial casino games, the Tribe shall make payments to the State as provided in subsection (C).
>
> (C) From and after the effective date of this Compact (as determined pursuant to Section 11 of this Compact), and so long as the conditions set forth in subsection (B) remain in effect, the Tribe will make semi-annual payments to the State as follows:
>
> (i) Payment to the Michigan Strategic Fund, or its successor as determined by State law, in an amount equal to eight percent (8%) of the net win at the casino derived from all Class III electronic games of chance, as those games are defined in this Compact.

Pursuant to their terms, the Compacts would not take effect until they were approved by a concurrent resolution of the Michigan Legislature. That approval came

when the Legislature approved the Compacts by passing House Concurrent Resolution ("HCR") 115 on December 10 and 11, 1998.

On July 22, 2003, Governor Granholm consented to an amendment to the LTBB Compact ("LTBB Amendment").[3] Among other things, the LTBB Amendment permitted the construction of a second casino on the LTBB's eligible Indian lands. The specific location of that casino is contingent upon the approval by the local unit of government. The LTBB Amendment amended Section 17(C) to provide that the LTBB shall make semi-annual payments to the State "as directed by the Governor or designee[.]" (LTBB Amendment, p 3; TOMAC App at 63a.)

II. PROCEEDINGS.

A. Nature of the Case.

This case has been pending for seven years. On June 10, 1999, TOMAC filed this action in the Ingham County Circuit Court seeking a declaration that the Compacts are unconstitutional on the theory that they are legislative in nature. In Count I of its Complaint, TOMAC claimed that the Legislature's approval of the Compacts by concurrent resolution violated Const 1963, art 4, §22, of the Michigan Constitution, which requires that all legislation be by bill. Count II asserted that the State violated the Local Acts Provision, Const 1963, art 4, §29, because the Legislature failed to treat the Compacts as local or special acts. Finally, Count III alleged that the provision in the Compacts permitting the State and the Tribes to amend the Compacts without approval by the Legislature violated the Separation of Powers Clause, Const 1963, art 3, §2. TOMAC did not raise any

[3]A copy of the LTBB Amendment is included in TOMAC's App at 61a-64a.

challenge to the Compacts based on the Appropriations Clause. (*See* Complaint, pp 16 through 22; App at 34b-40b.)[4]

B. Rulings in the Circuit Court and in the First Round of Appeals.[5]

The Circuit Court ruled that the Compacts were "legislation" and thus violated Const 1963, art 4, §22, and, further, that the amendment provision violated the Separation of Powers Clause. On appeal, the Court of Appeals reversed, holding that the Compacts were not legislation, but contracts; it further concluded that the Separation of Powers issue was not ripe for review since the Governor had not signed any Compact amendments. *See Taxpayers of Michigan Against Casinos v State of Michigan*, 254 Mich App 23; 657 NW2d 503 (2002). On leave granted, this Court affirmed the Court of Appeals' decision. *Taxpayers of Michigan Against Casinos v State of Michigan*, 471 Mich 306; 685 NW2d 221 (2004) ("*TOMAC I*"). This Court defined legislation as "unilateral regulation", which is what "distinguishes legislation from contracts." 471 Mich at 318. Because the "Legislature could not have unilaterally exerted its will over the tribes . . . ", this Court reasoned, "the compacts can only be described as contracts, not legislation." 471 Mich at 319. In addition, this Court remanded the Separation of Powers issue to the Court of Appeals because, while the matter was pending in this Court, the Governor had signed the LTBB Amendment.

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[4]As used in this Brief, the term "App" refers to the Joint Appendix of Appellees State of Michigan, Little Traverse Bay Bands of Odawa Indians and Gaming Entertainment (Michigan), LLC.

[5]This section presents only a brief summary of these proceedings. A complete statement of them is found in the Brief of the State of Michigan as Appellant at pp 4 through 7.

C. Proceedings in the Court of Appeals on Remand.

On remand, the Court of Appeals directed the parties (including the LTBB, which had been permitted to intervene) to brief the remanded Separation of Powers issue. On November 5, 2004, the State, the LTBB and TOMAC filed their briefs. (Dkt # 127-130.)[6] In its submission, TOMAC argued not only the remanded issue, but asserted its position on a new issue – that *TOMAC I* had overruled *Tiger Stadium's* holding that a consent decree requiring tribes to pay the MSF a portion of their net win did not violate the Appropriations Clause of the Michigan Constitution. On this basis, TOMAC argued that Section 17 of the Compact violated the Appropriations Clause and asserted that new claim in the Court of Appeals. On November 12, 2004, Intervenor Gaming Entertainment, LLC ("GE") moved to strike that portion of TOMAC's brief dealing with that argument because it went far beyond this Court's remand instructions and was inconsistent with this Court's holding in *TOMAC I* that no provision of the Compacts required legislative enactment. (Dkt # 134.) On December 9, 2004, the Court of Appeals granted GE's motion. (Dkt # 143.)

On September 27, 2005, the Court of Appeals issued a split decision holding that the amendment provision violated the Separation of Powers Clause of the Michigan Constitution. *See Taxpayers of Michigan Against Casinos v State of Michigan (On Remand)*, Case No. 225017 (9/22/05) ("*TOMAC On (Remand)*"). In keeping with its earlier ruling granting GE's motion to strike, the court "decline[d] to address plaintiffs' additional arguments." (*TOMAC (On Remand)*, p 12; TOMAC App at 164a.)

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[6]"Dkt" refers to the docket of Court of Appeals Case No. 225017 and Supreme Court Case No. 129822, which is included in App at 1-16b.

ARGUMENT

I. STANDARD OF REVIEW.

Whether the Revenue Sharing Provision of the Compacts violates the Appropriations Clause of the Michigan Constitution is reviewed de novo. *Harvey v State*, 469 Mich 1, 6; 664 NW2d 767 (2003).[7] Furthermore, the Legislature's approval of the Compacts with the Revenue Sharing Provision included in it is entitled to a presumption of constitutionality. *Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934) ("All presumptions are in favor of the constitutionality of the deliberate acts of a co-ordinate department of government"). Finally, the "burden of proving an alleged constitutional violation rests on the party asserting it." *Morris v Metriyakool*, 107 Mich App 110, 116-117; 309 NW2d 910 (1981). The burden is heavy. This "allegation must be sustained not as a matter of speculation but as a demonstrable reality." *Id* at 117.

II. *TIGER STADIUM* DOES NOT CONTROL THE ISSUES BEFORE THIS COURT.

TOMAC has framed the issue involved in its appeal as whether this Court's decision in *Taxpayers of Michigan Against Casinos v State of Michigan*, 471 Mich 306; 685 NW2d 221 (224) ("TOMAC I") "overruled" *Tiger Stadium Fan Club, Inc v Governor*, 217 Mich App

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[7]If this Court views the issue raised by TOMAC's appeal as whether the Court of Appeals erred in granting GE's motion to strike, the standard of review is abuse of discretion. *See*, *Brown v Hayes*, 270 Mich App 491, 494; --- NW2d --- (2006) ("We review for an abuse of discretion a trial court's decision regarding a motion to strike a pleading."). A court abuses its discretion when an unprejudiced person considering the facts upon which the lower court relied would say that there was no justification or excuse for the ruling. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761-762; 685 NW2d 391 (2004). The Court of Appeals granted GE's motion because TOMAC was barred from raising the Appropriations Clause issue on remand for a variety of procedural reasons, including *res judicata*. As explained in the brief of *Amici* Little River Band of Ottawa Indians, the Pokagan Band of Potawatomi Indians and the Nottawaseppi Huron Band of Potawatomi, the Court of Appeals' ruling was correct.

439; 553 NW2d 7 (1996). Although TOMAC may dislike the result in *Tiger Stadium*, it fully endorses its analytical framework. *Tiger Stadium*'s theory is that payments to the MSF out of tribal gaming revenues are not subject to legislative appropriation if the State made no "concession" for them. TOMAC makes no attempt to justify the validity of this approach and simply adopts it as a correct statement of controlling law. On that basis, it argues that, in light of *TOMAC I*'s holding that the Compacts in this case are contracts, the State must have given consideration for the payments and, thus, they are subject to appropriation.

It cannot be emphasized enough that the analysis used in *Tiger Stadium*, a decision of a lower court, does not control *this* Court. Rather than relying on *Tiger Stadium's* theory, this Court should look at the issues afresh, starting from an application of the relevant constitutional language, a task not undertaken in *Tiger Stadium*. Such an analysis is presented below. It demonstrates that (1) the Compact provision requiring the Tribes to pay a percentage of their gaming revenue to the MSF is not an "appropriation", and (2) the MSF is fully authorized by statute to receive such funds. Thus, the Revenue Sharing Provision is legally sound.

III. THE REVENUE SHARING PROVISION DOES NOT VIOLATE THE APPROPRIATIONS CLAUSE.

TOMAC contends that the Tribe's agreement to pay a portion of its gaming revenue to the MSF violates the Appropriations Clause because that agreement amounts to an appropriation that can be accomplished only through legislation, not a resolution. The plain language of the Appropriations Clause, however, refutes TOMAC's position

The Appropriations Clause, by its own clear terms, applies only to money paid out of the State Treasury. It provides: "No money shall be paid out of the *state treasury*

except in pursuance of appropriations made by law." Const 1963, art 9, §17 (emphasis supplied). Because the constitution is the fundamental law of Michigan, ratified by popular vote, the terms in the Appropriations Clause are to be given their plain meaning.

> Our first inquiry, when interpreting constitutional provisions, "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." This is accomplished by "applying each term's plain meaning at the time of ratification."

County Road Ass'n of Michigan v Governor, 474 Mich 11, 15; 705 NW2d 680 (2005), quoting *Wayne Co v Hathcock*, 471 Mich 445, 468-469; 684 NW2d 765 (2004). This principle is deeply embedded in Michigan's constitutional jurisprudence. *See Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 639; 272 NW2d 495 (1978) quoting *People v Dean*, 14 Mich 406, 417 (1866) ("The cardinal rule of construction, concerning language, is to apply to it that meaning which it would naturally convey to the popular mind."). The plain meaning of the Appropriations Clause is that it requires a legislative appropriation only for money to be paid out of the *State Treasury*. The clause could have had no other meaning to the voters who ratified the 1963 constitution.

In light of this clear limitation on the reach of the appropriations power, the constitution does not require legislation to pay money out of a source different from the State Treasury. Under Section 17 of the Compact, the money is to be paid to the MSF out of *tribal casino revenues*, not out of the State Treasury. Thus, the Appropriations Clause does not require legislation in order for the Tribes to make the payment required by Section 17.

Indeed, requiring legislative appropriation of tribal revenues would be inconsistent with federal law. Federal law does not treat the tribal casino revenues as an extension of

a state's treasury. Federally recognized Indian tribes are "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 US 505, 509; 111 SCt 905; 112 LEd 2d 1112 (1991), quoting *Cherokee Nation v Georgia*, 5 Pet 1; 8 LEd 25 (1831). Relations with Indian Tribes are subject to the plenary power of Congress. *County of Oneida, New York v Oneida Indian Nation of New York State*, 470 US 226, 234; 105 SCt 1245; 84 LEd 2d 169 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."). The federal law governing tribal gaming, IGRA, specifically limits a state's power "to impose any tax, fee, charge, other assessment upon the activities of an Indian Tribe" beyond what is "necessary to defray the cost of regulating such activity." *See* 25 USC §2710(d)(3)(C)(iii), (4); *Tiger Stadium*, 217 Mich App at 450-451 ("The IGRA does not mandate that tribes pay a percentage of gaming revenues to the state, and, indeed, expressly forbids a state from exacting fees in excess of those necessary to offset regulatory expenses . . . "). If the states do not even have taxing power over the tribes then *a fortiori* a state cannot treat tribal gaming revenue *as its own*.

Despite the clear limitation on the scope of the appropriations power, TOMAC, relying on *Tiger Stadium*, argues that the tribal payments became subject to the Appropriations Clause because the State gave consideration for them. Because the State gave consideration, TOMAC argues, such payments became "receipts of state government" that must be placed within the control of the State Treasurer under MCL 18.1441(1). (TOMAC's Brief at 8.) Since that statute brings those funds within the control of the State

Treasurer, the argument goes, they must be appropriated before they can be paid to the MSF. This argument does not survive examination.

MCL 18.1441(1) is part of the Management and Budget Act, MCL 18.1101 *et seq*, which, among other things, created the Department of Management and Budget, MCL 18.1121. Section 441(1) of that legislation provides as follows:

> The receipts of state government, from whatever source derived, shall be deposited pursuant to directives issued by the state treasurer and credited to the proper fund. The director [of the Department of Management and Budget] shall issue directives to implement this section relative to the accounting of receipts.

MCL 18.1441(1).

This statute does not apply to the tribal payments to the MSF. MCL 18.1441(1) applies only to "receipts of *state government*." Under Section 17, the Tribe agreed to make payments to the MSF or its successor in exchange for the State's agreement that such payments would continue only so long as Michigan law did not permit an expansion of electronic games of chance or commercial casino games in Michigan. (*See* Compact, §17(B); TOMAC's App at 21a.) The State's agreement to this condition on the duration of the payment obligation gave the State an incentive (but not a duty) to maintain the status quo. To the extent that this incentive can be characterized as "consideration" it was given by the State in exchange for the Tribe agreeing to pay *the MSF*. Thus, the payments are "receipts" of the MSF, *not of the State*.

To fully understand that point it must be kept in mind that the MSF is distinct from the State of Michigan. The MSF is a public corporation that was created by the Michigan Strategic Fund Act ("Act"), MCL 125.2001 *et seq*, to promote the economic development

of Michigan. *See* MCL 125.2002. The MSF was created as a "public body corporate and politic" that is governed by a board of directors whose membership is drawn principally from the private sector. MCL 124.2005(1), (3), (4). The fund exists as an "*autonomous entity* within the department of treasury[.]" MCL 125.2005(1) (emphasis supplied). As an autonomous entity, it has complete control over all of its powers, duties, functions and property, including its funds. "The statutory authority, powers, duties, functions, records, personnel, property, unexpended balances of appropriations, allocations, and other funds of the fund, including the functions of budgeting, procurement, personnel, and management-related functions, *shall be retained by the fund*[.]" *Id* (emphasis supplied).

The distinction between a public body corporate, like the MSF, and the State is expressly recognized by the constitution. Its provisions concerning the power to borrow money clearly distinguish between the State and a public corporation. The Constitution provides that the State has no general power to borrow money. Const 1963, art 9, § 12 ("No evidence of state indebtedness shall be issued except for debts authorized pursuant to this constitution."). *See also Advisory Opinion re Constitutionality of PA 1966, No 346*, 380 Mich 554, 563; 158 NW2d 416 (1968) ("The State of Michigan is not authorized generally to borrow."). In contrast, public bodies corporate do have such power. Const 1963, art 9, § 13 ("Public bodies corporate shall have the power to borrow money and to issue their securities evidencing debt subject to this constitution and law."). *See also Advisory Opinion*, 380 Mich at 564 ("Public corporations, *unlike the State*, have general power to borrow money[.]" [Emphasis supplied.]) The distinction between the MSF and the State is further recognized in the Act. *See* MCL 125.2007(b) (MSF may receive gifts, grants,

loans and other aids "from . . . state . . . government[.]"), MCL 125.2023(8)(c) (permitting the MSF to issue a resolution authorizing notes or bonds that contain a covenant of a pledge of a loan, grant or contribution "from ... state . . . government[.]"), MCL 125.2023(11) ("This state is not liable on notes or bonds of the fund, and the notes or bonds shall not be considered a debt of this state.")

Furthermore, the Act expressly provides that funds received by the MSF are not subject to the control of the State Treasurer. Although the MSF is "within" the Department of Treasury, it "exercise[s] its prescribed statutory powers, duties and functions *independently of the state treasurer*. . . ." MCL 125.2005(1) (emphasis supplied). As noted above, the statute also describes the MSF as an "autonomous" entity within the Department of Treasury that has "retained" its statutory power over "unexpended balances of appropriations, allocations, and other funds[.]" *Id.* By giving the MSF "independence" and "autonomy" from the State Treasurer and control over its own funds, the Legislature plainly intended that monies received by the MSF would not be subject to "directives issued by the state treasurer" pursuant to MCL 18.1441(1). *Compare*, *Advisory Opinion*, 380 Mich at 583 ("Moneys of the State housing development authority are not moneys of the State.").

Because the payments to the MSF are not made out of the "receipts of state government", but out of tribal gaming revenues, the Legislature has no power to "appropriate" those funds. Consequently, the provision in the Compact requiring the Tribes to make their payments to the MSF falls outside the scope of the Appropriations Clause.[8]

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[8]For the same reason, the amendment to Section 17 does not offend the Appropriations Clause. The amendment provides that the payments to the State are to be made "as directed by the Governor or designee[.]" (LTBB Amendment, p 3; TOMAC's App (continued...)

IV. THE MSF IS STATUTORILY AUTHORIZED TO RECEIVE THE TRIBAL PAYMENTS.

The statute creating and governing the MSF authorizes it to accept the tribal payments designated for it by Section 17. Thus, the provision in the Compact requiring the Tribe to make its payment to the MSF is consistent with statutory law as well as with the constitution.

The Legislature gave the MSF expansive powers to accomplish its important goal of promoting economic development. Among them is the power to

> accept gifts, grants, loans, and other aids from any person or the federal, state, or a local government or any agency of the federal, state, or a local government, or to participate in any other way in any federal, state or local government program.

MCL 125.2007(b). In determining whether the tribal payments fall within the language of this provision, this Court must "discern and give effect to the intent of the Legislature" by considering "both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *People v Gillis,* 474 Mich 105, 114; 712 NW2d 419 (2006). Furthermore, in interpreting statutory language pertaining to the MSF's powers, such as the power to accept various sources of funding, the Legislature itself has provided guidance – such provisions are to be "broadly interpreted."

> This act shall be construed liberally to effectuate the legislative intent and the purpose of the act as complete and independent authority for the

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[8](...continued)
at 63a.) TOMAC has made only a facial, not an "as applied", challenge to this aspect of the amendment. This amendment is unconstitutional on its face only if "no set of circumstances exists under which the [a]ct would be valid." *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999). The amendment permits the Governor to direct the Tribe to make the payments to the State Treasury. That act would be consistent with the Appropriations Clause. Thus, the amendment is facially constitutional.

> performance of each and every act and thing authorized in the act and *all powers granted in the act shall be broadly interpreted to effectuate such intent and purposes and not as to limitation of powers.*

MCL 125.2091 (emphasis supplied).

The tribal payments fall within MCL 125.2007(b) because they are "gifts", "grants" or "aids." To ascertain the ordinary meaning of these statutory terms, which are undefined, dictionary definitions are relevant. *Griffith v State Farm Mutual Automobile Ins Co,* 472 Mich 521, 526; 697 NW2d 895 (2005) (This Court "accord[s] undefined statutory terms their plain and ordinary meanings and may consult dictionary definitions in such situations."). According to *Webster's Ninth New Collegiate Dictionary (1991)* at p 517, a "gift" is "something voluntarily transferred by one person to another without compensation." That same dictionary also defines a "grant" as "[s]omething granted; *esp* : a gift (as of land or money) for a particular purpose." *Id* at p 532. Thus, the ordinary sense of "gift" or "grant" is something that is voluntarily provided to another with no compensation provided by the recipient. An "aid" is an even broader concept. The dictionary defines the term as "a: the act of helping b: help given: assistance; *specif*: tangible means of assistance (as money or supplies)." *Id* at p 66.

As explained above, the State entered into an agreement with the Tribe whereby the Tribe would make payments to the MSF in exchange for the State agreeing that the payment obligation would cease if the status quo changed in the manner described in Section 17(B). The recipient of these payments is the MSF. *It is undisputed that the MSF gave no compensation or other consideration for this benefit.* Therefore, the MSF received a "gift" or "grant." It also received an "aid" since the payments certainly gave "help" and

"assistance" to the MSF. In sum, the tribal payments to the MSF are "gifts", "grants" or "aids", which the Act permits the MSF to accept.

V. THE PROVISION REQUIRING PAYMENT TO THE MICHIGAN STRATEGIC FUND IS SEVERABLE.

TOMAC's constitutional challenge attacks only the provision of Section 17 that requires the Tribe to make its payment directly to the MSF. TOMAC argues that, if its challenge succeeds, the entire Compact is unenforceable. This argument fails because the provision is severable from the rest of Section 17 and the Compact.

The severability of contract provisions is governed by familiar principles. "The failure of a distinct part of a contract does not void valid, severable provisions." *Professional Rehabilitation Associates v State Farm Mutual Auto Ins Co*, 228 Mich App 167, 174; 577 NW2d 909 (1998). "[W]hen determining whether a contractual provision is severable, it is clear that the primary consideration is the intention of the parties." *Samuel D. Begola Services, Inc v Wild Bros*, 210 Mich App 636, 641; 534 NW2d 217 (1995). The parties to the Compact set forth their intentions in the following paragraph:

> In the event that any section or provision of this Compact is disapproved by the Secretary of the Interior of the United States or is held invalid by any court of competent jurisdiction, it is the intent of the parties that the remaining sections or provisions of this Compact, and any amendments thereto, shall continue in full force and effect. This severability provision does not apply to Sections 17 and 18. (Compact, § 12(E); TOMAC App at 18a.)

TOMAC argues that, under the second sentence of this paragraph, if Section 17 or any provision of it is declared to be invalid, then every other Compact section and provision is unenforceable. TOMAC's interpretation of the second sentence is incorrect.

The two sentences of Section 12(E) perform two distinct functions. The first sentence is the "severability provision" of the Compact and is referred to as such in the paragraph's second sentence. It expresses the parties' intention that each provision of the Compact is severable from every other provision. The second sentence limits the reach of the severability provision; it says that the provision "does not apply" to Sections 17 and 18. This sentence does not *affirmatively express* the parties' intent that Sections 17 and 18 are *not* severable, as TOMAC assumes. Instead, it means that, unlike the other sections and provisions of the Compact, the parties express *no intent one way or the other* on the severability of the provisions contained in Sections 17 and 18.

Since the severability clause is silent on the parties' intent regarding the severability of the provisions of Section 17, this Court should look to the language of that section to determine the parties' intentions. As this Court has recently observed, the touchstone of the severability inquiry is to determine if the provision in question is "central to the parties' agreement." *Stokes v Millen Roofing Co*, 466 Mich 660, 666; 649 NW 2d 371 (2002). The basic function of Section 17 is to provide "a mechanism to reduce the proliferation of Class III gaming enterprises in the State in exchange for the Tribe providing important revenue to the State." (Compact, §17(A); TOMAC App at 21a.) The "mechanism" is a Compact provision obligating the Tribe to make payments to the MSF only so long as Michigan law does not permit an expansion of commercial casino gaming or electronic games of chance in Michigan. (Compact, §17(B); TOMAC App at 21a.)[9] This mechanism works because the

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[9]The legality of this mechanism is not at issue in the present litigation between the State and certain tribes. *State of Michigan et al v Little River Band of Ottawa Indians et al,* (Case No. 5:05-cv-95, WD Mich). That case concerns whether a change in Michigan (continued...)

Tribe's payment to the MSF is sufficient to give the State an incentive to restrict the expansion of gaming. It is only where there is *no* such incentive that the parties intended the rest of the compact to be unenforceable. (*See* Letter from Governor John Engler to Senator Posthumus and Representative Hertel; App at 17b) ("The only other changes to these compacts are under Section 12(E) which makes it explicit that the Secretary of Interior cannot approve the compact if he determines that the payment to the state or local jurisdictions are invalid for any reason.").

There is nothing peculiar about funding the MSF that makes it uniquely situated to motivate the State to contain the expansion of casino gaming. In fact, the Compact contemplates that payment to the MSF is but one way to provide the requisite incentive to the State. Section 17 expressly allows the payments to be made to the MSF "*or its successor as determined by state law.*" (Compact, § 17(c)(i); TOMAC App at 21a; emphasis supplied.) Thus, the MSF as recipient is not central to the parties' core agreement, and, therefore, this portion of Section 17 is severable.

If this Court were to invalidate the provision requiring payment to the MSF, it is clear how the remaining contract would operate - - the Tribe would simply make its payments to the MSF's "successor as determined by State law." Were this Court to find payment to the MSF to be unconstitutional, it would be because it concluded that the Appropriations Clause

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[9](...continued)
gaming law that, under Section 17(B), relieves the Tribes of their payment obligation, has occurred. Specifically, the issue is whether the Lottery Bureau's recently implemented "Club Keno" game is an electronic game of chance or a commercial casino game within the meaning of Section 17(B). (*See* Amended Complaint, ¶ 71, 82; TOMAC App at 184a-187a.) Consequently, that litigation does not concern the *legality* of any section of Section 17, but only whether the condition terminating the Tribe's payment obligation has occurred.

and MCL 18.1441(1) require the tribal payments to be deposited in the State Treasury as "receipts of state government." If "State law" is so interpreted and applied by this Court, the State Treasury would be the MSF's "successor" as the recipient of the Tribal payment.

This operation of the contract after severance is well within the intentions of the parties. As indicated above, the State and the Tribe intended the Tribe to make a payment that would be sufficient to motivate the State to contain the expansion of casino gaming. Clearly, a payment to the State Treasury as the MSF's successor would suffice for that purpose. This, too, indicates that the MSF payment provision is severable from the contract. *See Professional Rehabilitation Associates*, *supra*, 228 Mich App at 174 (where statute barred only assignment of future no-fault benefits, assignment of past benefits was severable from global assignment because "the parties intended to assign [insured's] right to recover payment for . . . past due benefits.").

In sum, a finding that the MSF provision is invalid would still leave the Tribes's basic payment obligation intact. The only difference is that the money, originally received by the MSF, would be paid directly to the State Treasury. Thus, invalidating the MSF provision would leave the rest of the Compact enforceable.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, the State requests that this Court hold that Section 17 and

the LTBB Amendment do not violate the Appropriations Clause of the Michigan Constitution nor any statute of this State.

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